Supreme Court, U. S.
FILED
JUN 22 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-1164

DR. N. JAY ROGERS, O. D. and W. J. DICKINSON, Individually and as President of the TEXAS SENIOR CITIZENS ASSOCIATION, PORT ARTHUR, TEXAS CHAPTER,
Appellants

v.

DR. E. RICHARD FRIEDMAN, O. D., DR. JOHN B. BOWEN, O. D., DR. HUGH A. STICKSEL, JR., O. D., DR. JOHN W. DAVIS, O. D., DR. SAL MORA, O. D., Individually and in their official capacity as members of THE TEXAS OPTOMETRY BOARD; and THE TEXAS OPTOMETRIC ASSOCIATION, INC.,
Appellees

On Appeal from the United States District Court for the Eastern District of Texas (Three-Judge)

BRIEF FOR THE APPELLANTS IN NO. 77-1164

Of Counsel:
MEHAFFY, WEBER, KEITH & GONSOULIN
Beaumont, Texas
DE LEON & DAVIS
Austin, Texas
VICTOR J. ROGERS, II
Houston, Texas

Counsel of Record:
ROBERT Q. KEITH
MEHAFFY, WEBER, KEITH & GONSOULIN
1400 San Jacinto Building
Beaumont, Texas 77701

ROBERT Q. KEITH
BRIAN R. DAVIS
VICTOR J. ROGERS, II
ARTHUR R. ALMQUIST
Attorneys for Appellants

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

INDEX

	Page
Opinion Below	1
Jurisdiction	2
Statutes Involved	2
Questions Presented	3
Statement of the Case	4
Summary of Argument	12
Argument	13
I. The requirement that at least two-thirds of the Board be members of TOA deprives Appellant of Fourteenth Amendment Equal Protection	13
II. The purported "rational bases" for § 2.02 are refuted by the evidence in the record	20
III. The requirement that at least two-thirds of the Board be members of TOA denies Appellant, Dr. N. Jay Rogers, Fourteenth Amendment Due Process	27
A. Substantive Due Process	27
B. Procedural Due Process	30
IV. The requirement that at least two-thirds of the Board be members of TOA infringes upon the Senior Citizens' First Amendment rights to receive valuable commercial information	49
V. The requirement that "at all times at least two-thirds" of the Board must be TOA members conflicts with § 1 of the Sherman Antitrust Act and therefore violates the Supremacy Clause of the United States Constitution	52
Conclusion	58

CITATIONS

CASES

	Page
Ashwander v. TVA, 297 U.S. 288 (1936)	57
Bates v. State Bar of Arizona, ____U.S.____, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977)	49, 50

CASES

	Page
Bishop v. Wood, 426 U.S. 341 (1976)	44
Board of Regents v. Roth, 408 U.S. 564 (1972)	44
Buckley v. Valeo, 424 U.S. 1 (1976)	36
Cantor v. Detroit Edison Co., ____U.S.____, 96 S.Ct. 3110, ____L.Ed.2d____ (1976)	56
Carrington v. Rash, 380 U.S. 89 (1965)	28
City of Eastlake v. Forrest City Enterprises, Inc., ____ U.S.____, 96 S.Ct. 2358 (1976)	36, 48
Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974)	28
Colorado Springs Amusements, Ltd. v. Rizzo, ____U.S. ____, 96 S.Ct. 3228, ____L.Ed.2d____ (1976)	48
Cook v. Hudson, 511 F.2d 744 (5th Cir. 1975), cert. granted 424 U.S. 941, cert. dism'd as improvidently granted 429 U.S. 165 (1977)	28
Edelman v. Jordan, 415 U.S. 651 (1974)	48
Elfbrandt v. Russell, 384 U.S. 11 (1966)	26
Elrod v. Burns, 427 U.S. 347 (1976)	16, 17, 19, 26
First National Bank of Boston v. Bellotti, ____U.S.____, 98 S.Ct. 1407, ____L.Ed.2d____ (1978)	35, 36
Fusari v. Steinberg, 419 U.S. 379 (1975)	46, 47, 48
Gibson v. Berryhill, 411 U.S. 564 (1973)	36, 37, 38, 40, 41, 43, 44, 46, 48
Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975)	48, 56
Hagans v. Levine, 415 U.S. 528 (1974)	57
Hicks v. Miranda, 422 U.S. 332 (1975)	44, 46
Hines v. Davidowitz, 312 U.S. 52 (1941)	55
Hortonville Joint School District No. 1 v. Hortonville Education Ass'n, ____U.S.____, 96 S.Ct. 2308, ____L.Ed. 2d____ (1976)	42
Hospital Building Co. v. Trustees of Rex Hospital, 425 U.S. 738 (1976)	55
House of Tobacco, Inc. v. Calvert, 394 S.W.2d 654 (Tex. 1965)	44
In re Gault, 387 U.S. 1 (1967)	57
In re Murchison, 349 U.S. 133 (1955)	42
In re Whittington, 391 U.S. 341 (1968)	57
Keyishian v. Board of Regents, 385 U.S. 589 (1967)	15, 17, 26, 29
Kusper v. Pontikes, 414 U.S. 51 (1973)	17, 19, 20
Marsh v. Alabama, 326 U.S. 501 (1947)	48
McCulloch v. Maryland, 4 Wheat. 316, 17 U.S. 316 (1819)	55
McGowan v. Maryland, 366 U.S. 420 (1961)	15
NAACP v. Alabama, 357 U.S. 449 (1958)	28
National Society of Professional Engineers v. United States, __U.S.__, 98 S.Ct. 1355, __LdEd.2d__ (1978)	24, 53, 54, 58, 59

CASES

	Page
New Orleans v. Dukes, 427 U.S. 297 (1976)	21, 27
North Dakota State Board of Pharmacy v. Snyder's Drug Stores, 414 U.S. 156 (1973)	45, 46
Parker v. Brown, 317 U.S. 341 (1943)	56
Patterson v. State of Alabama, 294 U.S. 600 (1935)	56
Perez v. Campbell, 402 U.S. 637 (1971)	55
Pickering v. Board of Education, 391 U.S. 563 (1968)	18, 19
Rosado v. Wyman, 397 U.S. 397 (1970)	56
Steffel v. Thompson, 415 U.S. 452 (1974)	38
Swift & Co. v. Wickham, 382 U.S. 111 (1965)	56
Taylor v. Hayes, 418 U.S. 488 (1974)	42
Tumey v. Ohio, 273 U.S. 510 (1927)	42, 43
Turner v. Fouche, 396 U.S. 346 (1970)	15, 17
United Mine Workers v. Illinois State Bar Association, 389 U.S. 217 (1967)	51
United States v. Shotwell Manufacturing Co., 355 U.S. 233 (1957)	56
United States Department of Agriculture v. Murry, 413 U.S. 508 (1973)	28
Virginia State Board of Pharmacy v. Virginia Citizen's Consumer Council, Inc., 425 U.S. 748 (1976)	36, 46, 50, 55
Vlandix v. Kline, 412 U.S. 441 (1973)	28
Wall v. American Optometric Association, Inc., 379 F.Supp. 175 (N. D. Ga. Three-Judge Court 1974), affirmed 419 U.S. 888 (1974)	36, 37, 38, 39, 40, 41, 43, 44, 45, 46, 47, 48
Ward v. Villiage of Monroeville, 408 U.S. 57 (1972)	43
Wieman v. Updegraff, 344 U.S. 190 (1952)	26
Williams v. Rhodes, 393 U.S. 23 (1968)	14, 16, 17, 21
Williamson v. Lee Optical of Oklahoma, 348 U.S. 483 (1955)	45, 46
Withrow v. Larkin, 421 U.S. 35 (1975)	42
Youakim v. Miller, 425 U.S. 231 (1976)	57

UNITED STATES CONSTITUTION

Article Six	52, 53
First Amendment	3, 11, 12, 15, 19, 20, 27, 37, 46, 49, 51, 52, 54, 58
Fourteenth Amendment	3, 11, 13, 14, 15, 19, 20, 27, 28, 29, 34, 58

UNITED STATES STATUTES

15 U.S.C. Section 1	24, 52, 53
28 U.S.C. Section 1253	2
28 U.S.C. Section 2106	56

Page

REVISED CIVIL STATUTES OF TEXAS

Article 4552 (Texas Optometry Act)

Section 2.02 ..... cited throughout
Section 2.05(c) 40
Section 2.07 4
Section 2.09 5
Section 2.10 5
Section 2.14 ..... 5, 32, 38
Section 3.01 4
Section 3.06 4
Section 3.07 4
Section 4.04 5
Section 5.09(a) 9, 11, 33, 49
Section 5.09(b) 5
Section 5.10 5
Section 5.11 31
Section 5.12 26
Section 5.15 ..... 4, 5, 11, 25, 26

TEXTS

Benham and Benham, *Regulating Through the Professions: A Perspective on Information Control*, 13 JOURNAL OF LAW AND ECONOMICS 421 (1975) 24
Staff Report to the Federal Trade Commission, Advertising of Ophthalmic Goods and Services, January 1976 ..... 9, 23

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-1164

DR. N. JAY ROGERS, O. D. and W. J. DICKINSON, Individually and as President of the TEXAS SENIOR CITIZENS ASSOCIATION, PORT ARTHUR, TEXAS CHAPTER,
Appellants

v.

DR. E. RICHARD FRIEDMAN, O. D., DR. JOHN B. BOWEN, O. D., DR. HUGH A. STICKSEL, JR., O. D., DR. JOHN W. DAVIS, O. D., DR. SAL MORA, O. D., Individually and in their official capacity as members of THE TEXAS OPTOMETRY BOARD; and THE TEXAS OPTOMETRIC ASSOCIATION, INC.,
Appellees

On Appeal from the United States District Court for the Eastern District of Texas (Three-Judge)

BRIEF FOR THE APPELLANTS IN NO. 77-1164

OPINION BELOW

The memorandum opinion of the three-judge United States District Court for the Eastern District of Texas, Beaumont Division, is reported at 438 F. Supp. 428 (September 12, 1977).

JURISDICTION

In this direct appeal this Court's jurisdiction rests on 28 U.S.C. § 1253. The three-judge court rendered judgment on October 27, 1977. (Appendix A to Jurisdictional Statement in No. 77-1164). Appellants filed their notices of appeal on December 21, 1977. (Appendix B to Jurisdictional Statement in No. 77-1164). Appellants filed their Jurisdictional Statement on February 16, 1978. This Court noted probable jurisdiction on April 17, 1978 and ordered this appeal consolidated with Nos. 77-1163 and 77-1186. ____U.S.____. 98 S.Ct. 1604, ____L.Ed.2d____ (1978).

STATUTES INVOLVED

Section 2.02 of the Texas Optometry Act, Article 4552, Revised Civil Statutes of Texas, enacted in 1969, provides:

> To be qualified for appointment as a member of the board, a person must be a licensed optometrist who has been a resident of this state actually engaged in the practice of optometry in this state for the period of five years immediately preceding his appointment. A person is disqualified from appointment to the board if he is a member of the faculty of any college of optometry, if he is an agent of any wholesale optical company, or if he has a financial interest in any such college or company. *At all times there shall be a minimum of two-thirds of the board who are members of a state optometric association which is recognized by and affiliated with the American Optometric Association.*

Other relevant provisions of the Texas Optometry Act have been reproduced in Appendix C to the Jurisdictional

Statement of Dr. N. Jay Rogers and W. J. Dickinson, Individually and as President of the Texas Senior Citizens Association, Port Arthur, Texas Chapter, Appellants herein, and in Appendix A to their Motion to Affirm filed by them as Appellees in Nos. 77-1163 and 77-1186.

QUESTIONS PRESENTED

1. Does § 2.02 of the Texas Optometry Act, by requiring that at least two-thirds of the Texas Optometry Board be members of the Texas Optometric Association, deprive Appellant, Dr. Rogers, of the equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution?

2. Is the determination of the district court that there is a rational basis for § 2.02's classification of optometrists according to their membership in a particular organization clearly erroneous and refuted by the evidence?

3. Does § 2.02 of the Texas Optometry Act, by requiring that at least two-thirds of the Texas Optometry Board be members of the Texas Optometric Association, deprive Appellant, Dr. Rogers, of due process of law as guaranteed by the Fourteenth Amendment?

4. Does the requirement of § 2.02 that at least two-thirds of the Texas Optometry Board be members of the Texas Optometric Association impermissibly infringe upon the Appellants', Texas Senior Citizens Association, Port Arthur, Texas Chapter, First Amendment rights to receive valuable commercial information?

5. Does the requirement that at least two-thirds of the Texas Optometry Board be members of the Texas Optometric Association conflict with § 1 of the Sherman Antitrust Act and thereby violate the Supremacy Clause?

STATEMENT OF THE CASE

On August 25, 1975, Dr. N. J. Rogers, a member of the Texas Optometry Board, filed his complaint against the remaining five members of the Texas Optometry Board assailing the constitutionality of § 2.02 of the Texas Optometry Act insofar as that statute dictates that at all times a minimum of two-thirds of the Texas Optometry Board members must be members of a state optometric association recognized by and affiliated with the American Optometric Association.[1] This statutory requirement was attacked (1) as an arbitrary and irrational classification "violative of the free speech and Equal Protection Provisions of the XIVth Amendment," which (2) also denies Dr. Rogers due process of law. (Complaint, App. 11, 15). A permanent injunction was sought against the enforcement of § 2.02.

The Texas Optometry Board is charged by law with administering a comprehensive statutory scheme for the regulation of optometry and opticianry in Texas. The Board:

1. Examines and licenses each optometrist (§§ 3.01, 3.06, 3.07);

2. Appoints committees, conducts investigations, and enforces the Act (§ 2.07);

---

1. Dr. Rogers also attacked the constitutionality of § 5.13(d) and § 5.15(e) of the Act. The three-judge court upheld the constitutionality of § 5.15(e) and Dr. Rogers has not appealed from that portion of the judgment. The three-judge court struck down § 5.13(d)'s prohibition on practice under a trade name on the ground that it violated the First Amendment. The defendant Board members and the Texas Optometric Association, Inc., have appealed from that portion of the trial court's judgment in Nos. 77-1163 and 77-1186. Those appeals have been consolidated before this Court with the appeal of Dr. Rogers and the Senior Citizens in this case.

3. May hold hearings and issue subpoenas (§ 2.10) and bring suit in its own name (§ 2.09);

4. May suspend or revoke the license of an optometrist (§ 4.04);

5. Regulates a variety of practices by dispensing opticians (§§ 5.09(b), 5.10, 5.15).

The Act, in § 2.14, explicitly limits the Board's rulemaking authority to procedural rules and regulations and states:

> The Board shall promulgate procedural rules and regulations only, . . . to govern the conduct of its business and proceedings. . . . The Board shall not have any power or authority to amend or enlarge upon any provision of this Act by rule or regulation or by rule or regulation to change the meaning in any manner whatsoever of any provisions of this Act * * * *

However, the Board has adopted a practice of issuing "Interpretations" of the Act and treats these "Interpretations" as if they were law. (Deposition of Dr. Jack Burton at 37, hereinafter "Burton depo."). The Board advises optometrists and opticians that a violation of a Board "Interpretation" will subject the violator to disciplinary action. (Deposition of Dr. Sal Mora taken on February 5, 1976 at 10, hereinafter "Mora depo. I").

Membership on the Texas Optometry Board is by gubernatorial appointment. A Board member *must* be:

(a) a licensed optometrist;

(b) a Texas resident;

(c) actually practicing for five years immediately preceding appointment. and

a Board member *may not* be:

(a) a faculty member of or have a financial interest in an optometry college or

(b) an agent of or have a financial interest in a wholesale optical company.

Appellants do not complain about these legitimate requirements. Appellants *do* challenge the additional requirement that of the six Board members:

> At all times there shall be a minimum of two-thirds of the Board who are members of a state optometric association which is recognized by and affiliated with the American Optometric Association.

In Texas, as in many states, there are two conflicting viewpoints regarding how visual care should be delivered to the public. The differences between these two viewpoints relate solely to differing philosophies over the economic aspects of optometry and opticianry; not to any questions concerning the professional quality of the care and materials that patients ought to be able to expect of visual practitioners.

One viewpoint, strongly held and advocated by those who refer to themselves exclusively as "professional" optometrists, opposes the use of any commercial merchandising or promotional techniques in connection with the examining, prescribing and dispensing functions. The other viewpoint, held by so-called "commercial" optometrists and dispensing opticians, such as Appellant, Dr.

Rogers, who is both a licensed optometrist and a dispensing optician, favors the use of trade names, advertising, multiple offices and related commercial techniques to provide visual services and materials to the public efficiently and at reasonable prices.

The Texas Optometric Association, Inc. (TOA), Appellee herein, endorses the "professional" viewpoint and mode of practice. TOA is a private membership corporation "recognized by and affiliated with the American Optometric Association" (AOA) within the meaning of § 2.02. TOA has been and continues to be the *only* organization in Texas possessing that particular credential. (App. 234).

As of May 12, 1976, a total of 934 Texas-licensed optometrists resided in Texas (Texas Optometry Board print-out dated May 12, 1976 under official certificate). Of that figure, only an outside maximum of 482 optometrists (or slightly more than one-half the total of 934 licensees in residence) were members of TOA actively engaged in practicing optometry. (Deposition of TOA Executive Director, Stanley Boysen, taken on written questions March 5, 1976 at question 5, hereinafter "Boysen depo. II"). In other words, 452 Texas-licensed optometrists residing in Texas were *not* members of TOA. There exists no reason to believe that these proportions have changed to any significant degree during the course of this litigation.

Membership in TOA is limited to optometrists, and even more exclusively to optometrists who *do not:*

1. Practice under any trade name;

2. Engage in any form of commercial advertising, including price advertising; or

> 3. Utilize any commercial management or merchandising techniques such as multiple offices, "commercial" locations for offices, transaction of business as a dispensing optician, and franchise-type purchasing, pricing and delivery of opthalmic goods and services.

(App. 399-416). This is the consequence of the AOA-TOA Codes of Ethics and Rules of Practice, which thoroughly repress commercial activity.

Accordingly, Dr. Rogers and all others who practice like him in the "commercial" mode are strictly precluded from belonging to TOA. Yet *every* Texas-licensed optometrist, TOA or non-TOA, holds exactly the same kind of license, is subject to the same examination and continuing educational requirements, and practices with the same degree of authority. Further, each is subject to the same statutory mandates and restrictions with respect to competence, honesty and proper patient care. No serious dispute exists between the "professional" TOA faction and the "commercial" non-TOA faction over proper patient treatment and proper lens prescriptions. (App. 279-280, 374, Deposition of N. Jay Rogers taken February 5, 1976 at 103, hereinfater "Rogers depo. I," Deposition of N. Jay Rogers taken on April 6, 1976 at 118-120, hereinafter "Rogers depo. II").

Indeed, "commercial" optometry and opticianry are perfectly lawful activities in Texas. State law does not limit to any degree the number of optometry or opticianry offices that a licensed optometrist may own. State law does not limit the number of optometrists or opticians that a licsensed optometrist may employ or have as partners. State law permits a licensed optometrist to transact

business also as a dispensing optician, even though the AOA-TOA codes and rules do not. In this very case the State of Texas has effectively conceded that it may no longer enforce a blanket ban on price advertising by optometrists, having declined to appeal the portion of the judgment that struck down § 5.09(a) of the Act. The official legislative history of the present Optometry Act clearly indicates the Texas Legislature's intention to "generously permit" the continued, unintimidated practice of "commercial" optometry and opticianry. (Proceedings Before Texas Senate Public Health Committee, May 9, 1969 at 28, on file herein under official certificate.)

Furthermore, the record ovewhelmingly establishes the *absence* of any systematic difference in the quality of eye care in Texas depending on whether a given practitioner transacts business "professionally" or "commercially," or whether he or she belongs or does not belong to TOA. Nor is there any qualitative difference in the lenses and frames dispensed by the members of the respective factions, for the same suppliers of lens blanks and ancillary optical merchandise are generally available to all optometrists and opticians. (Rogers Depo. II at 124-25, 150, App. 421-22). According to the affirmative, uncontradicted expert testimony below, the use of *commercial advertising* does not lead to a reduction in the quality of eye care. (App. 340-41, 346-48). The staff of the Federal Trade Commission likewise reached these conclusions, independently, in its exhaustive report, *Advertising of Ophthalmic Goods and Services,* January 1976 at 66-72.

Eligibility for membership in TOA is determined entirely by some twenty geographically drawn "local societies" of TOA. The state-level management of TOA

accepts or rejects an applicant for membership solely on the basis of the "local society's" recommendation. If the "local society" recommends that an optometrist be admitted to TOA, then the optometrist becomes a member of TOA and of AOA. Otherwise, no person is permitted to join TOA. (Deposition of Stanley Boysen on oral questions at 41-48, hereinafter "Boysen depo. I"). Nor do the various "local societies" of TOA use or maintain any written or publicly-knowable criteria for admission, *except for the AOA-TOA Codes of Ethics and Rules of Practice*. Moreover, there are no written or publicly-knowable criteria *whatever* by which admission to TOA at the state level is measured. (Deposition of Dr. James Riley, Jr. at 152, hereinafter "Riley depo.").

With the singular exception of the Texas Optometry Board, no administrative, legislative or judicial board, agency, commission or body in the entire State of Texas is required by constitutive law to draw its controlling majority "at all times" from a specified private association, corporation or other organization composed of its regulatees. See Advisory Commission on Intergovernmental Relations, *Handbook of Governments in Texas*. Section 2.02 of the Texas Optometry Act vests a private faction, notoriously zealous in its opposition to all forms of "commercialism," with perpetual supermajority control over the governmental regulation of optometry and the business of opticianry.

That faction's membership reflects the interests of only half, or slightly more, of all licensed optometrists residing in Texas. By its own rules that faction's membership does not represent the interests of *any* of the dispensing opticians who are regulated by the board that it irreversibly controls. It is undisputed that the Texas Optometry Board

regulates and disciplines dispensing opticians as well as optometrists. (Mora depo. I at 21-22; Burton depo. at 15). Yet, except to the very limited extent that their interests may presently be represented by Dr. Rogers, those persons and entities engaged in business as dispensing opticians have *no* representation on the Board.

This arbitrary and irrational statutory arrangement, which constitutes nothing other than the establishment and perpetuation by the State of Texas of a private government, denies Appellants rights guaranteed them by the free speech provisions of the First Amendment and the Equal Protection and Due Process Clauses of the Fourteenth. Dr. Rogers is joined in his attack by W. J. Dickinson, individually and as President of the Texas Senior Citizens Association, Port Arthur, Texas Chapter (Senior Citizens). (App. 28-39).[2]

On October 27, 1977, the three-judge court entered final judgment upholding § 2.02 of the Texas Optometry Act. The trial court held that § 2.02 "is not in violation of the First and Fourteenth Amendments of the United States Constitution." (See p. A-15, Jurisdictional Statement in No. 77-1164). In its memorandum opinion the lower court accepted Appellees' several asserted "rational bases for the requisite board composition," 438 F. Supp. at 432, and rejected the equal protection, due process and free speech challenges made by Dr. Rogers and the Senior Citizens, who then prosecuted this appeal.

---

2. The Senior Citizens also joined in Dr. Rogers' attack on § 5.13 (d) and § 5.15(e) and independently assailed the constitutionality of § 5.09(a), which prohibits price advertising by optometrists. The three-judge court struck down § 5.09(a)'s prohibition on price advertising as violative of the First Amendment and no party has appealed from that portion of the judgment.

SUMMARY OF ARGUMENT

By this brief Appellants demonstrate that § 2.02 of the Texas Optometry Act:

1. Denies Dr. Rogers equal protection of the law by imposing excessive burdens on his First Amendment rights to shape his associations free of governmental repressions and to engage in truthful commercial speech;

2. Denies Dr. Rogers due process of law by (a) arbitrarily, irrebutably presuming him less fit to serve on the Texas Optometry Board simply because he does not belong to TOA and by (b) subjecting him to incessant abuse at the hands of a philosophically biased and economically-interested regulatory board dominated perpetually by TOA;

3. Denies the Senior Citizens their First Amendment right to receive valuable commercial information by forcefully encouraging state-regulated optometrists to affiliate with TOA and adhere to TOA's tenets; and

4. Violates the Supremacy Clause by embracing a private organization, TOA, whose *raison d'etre* violates § 1 of the Sherman Act.

Appellants also establish that the purported "rational bases" for § 2.02 are illusory and clearly erroneous. In short, the evidence of record conclusively permits the singular finding that § 2.02 is based solely upon blatant, invidious discrimination.

Because fundamental associational and free speech interests are at stake, the Appellees bear the burden—

which they have not sustained—to demonstrate § 2.02's necessity to the effectuation of important countervailing state interests. Alternatively, and in any event, no state of facts is conceivable that would justify the discrimination institutionalized by § 2.02.

Furthermore, by its creation and reinforcement of a private government over the optical professions and trades in Texas, § 2.02 operates to deny due process—substantive and procedural; it represses communicative activity protected by the First Amendment; and it lends the state's endorsement, albeit not the state's compulsion, to significant concerted restraints of trade that violate federal antitrust policy.

For all the foregoing reasons the portion of § 2.02 of the Texas Optometry Act now in question is due to be struck down by this Court. Appellants are entitled to the relief prayed in their Conclusion to this brief.

ARGUMENT

I.

THE REQUIREMENT THAT AT LEAST TWO-THIRDS OF THE BOARD BE MEMBERS OF TOA DEPRIVES APPELLANT, DR. ROGERS, OF FOURTEENTH AMENDMENT EQUAL PROTECTION

The vesting of a minimum two-thirds majority of the seats on the Texas Optometry Board in TOA vests control of the Board in a special interest group that represents only half of the State's optometrists. This grant of control over the governmental body that regulates the profession impacts heavily on the rights of the state's

optometrists both (1) to associate to advance views differing from the views expressed by TOA on issues that are of vital importance to the entire profession, and (2) to engage in constitutionally permissible commercial free speech. If an optometrist claims his right to associate with others to advocate a lawful viewpoint in an association other than TOA or simply chooses to exercise his right not to associate with TOA, he is forever foreclosed from an opportunity to be a member of the Board majority or to have his interests advanced by a Board majority. An optometrist who claims his right of commercial free speech or who simply does not desire to abdicate that right by submitting himself to the restrictions of the AOA-TOA Codes of Ethics and Rules of Practice (App. 399-416) is forever foreclosed from an opportunity to be a member of the Board majority or to have his interests advanced by a Board majority.

This heavy impingement upon valuable associational and speech freedoms violates the equal protection assurances of the Fourteenth Amendment, absent a compelling state interest in making an otherwise arbitrary, discriminatory classification. *Williams v. Rhodes,* 393 U.S. 23 (1968).[3] The discriminatory requirement of § 2.02 is

---

3. In its Motion to Affirm or Dismiss at page 24 n. 4, TOA has contended that the argument that § 2.02 infringes upon Dr. Rogers' First Amendment rights of association and speech and thereby denies him the equal protection of the laws was not raised in the lower court and is not properly before this Court. The following facts establish that TOA's contention is without support in the record:

(a) Dr. Rogers' Complaint contained a prayer "That the Full Court declare § 2.02 . . . violative of the Free Speech and Equal Protection Provisions of the XIV Amendment to the Constitution of the United States." (App. 15).

(b) In the Brief of Plaintiff and Intervenors filed with the three-judge court, Dr. Rogers argued at pages 110-115 that this type of organizational membership requirement for service on

clearly more than mere economic regulation which will be upheld if there is a rational basis to justify it. *McGowan v. Maryland,* 366 U.S. 420 (1961).

Dr. Rogers does not contend that there is a constitutionally protected right to majority membership on the Board or even to any membership on the Board. However, when the *opportunity* to serve on the Board is denied because of associational ties, or the lack thereof, and the exercise of the right of free commercial speech, fundamental rights protected by the Constitution of the United States are impermissibly invaded. Compare *Keyishian v. Board of Regents,* 385 U.S. 589 (1967) and *Turner v. Fouche,* 396 U.S. 346 (1970).

In *Keyishian* this Court struck down a scheme that denied public employment as a teacher on the basis of mere membership in the Communist party, such membership being prima facie evidence of disqualification for employment in any public position. The statutory presumption infringed too greatly on protected associational interests and could not be justified by the state's interest in keeping subversives out of its public offices. In this case § 2.02 operates on the presumption that if an op-

---

a governmental board denies half of the state's optometrists a fair opportunity to exercise their political influence.

(c) The opinion of the three-judge court recognized the argument described in (b), above. See 438 F. Supp. at 431.

(d) The Final Judgment of the three-judge court in regard to § 2.02 holds that "such provision is not in violation of the First and Fourteenth Amendments of the United States Constitution."

(e) Finally, the Brief of Intervenor, Texas Optometric Association, Inc. filed with the three-judge court on September 20, 1976 states at page 4, "Dr. Rogers' primary attack on § 2.02 has been on the basis of procedural due process, substantive due process, and *equal protection* under the *First and Fourteenth Amendments.*" (emphasis added).

tometrist is not a TOA member he is not as qualified to serve on the Board as a TOA member. It disqualifies optometrists from majority membership on the basis of that presumption and violates their rights of association.

The right of association includes the right not to associate as well. In *Elrod v. Burns,* 427 U.S. 347 (1976) the patronage jobs in the sheriff's office were conditioned on membership in the Democratic party. The scheme denied employees the right *not* to associate with the Democratic party, if they wanted to keep their jobs. This Court accordingly found that First Amendment associational rights were violated.

In *Williams v. Rhodes,* 393 U.S. 23 (1968) the restrictions that made access to the ballot for any political parties other than the Democratic and Republican parties more difficult did not force anyone to join those parties but did deny meaningful input to the electoral process if one chose not to join either of those parties. Those restrictions were also found to violate First Amendment rights of association.

Similarly, an optometrist who chooses not to join TOA is denied majority membership on the Board because of his decision *not* to associate with TOA. His opportunity to serve in the majority or be represented by the majority is conditioned on a restriction of his right to freely associate to advance whatever economic, political or social goals he might hold.

The opportunity for majority membership or majority representation on the Board, while not constitutionally guaranteed, is a substantial interest. The Texas Legislature has delegated to the Board the power to determine who will be allowed to practice optometry. Thus,

the decisions of the Board on granting new licenses, applying the Optometry Act and revoking licenses already granted have substantial impact on the livelihood of the state's optometrists. The promulgation of substantive "Interpretations" of the Act can have subtle and not so subtle influences on the manner in which the state's optometrists may practice. In an era when regulatory bodies are increasingly engaging in the business of legislation, the limitation of access to those bodies becomes as inimical to the interests of free association to advocate political and economic viewpoints within an industry or profession as a limitation on access to the ballot becomes in the community-at-large.

A limitation on access to the ballot cannot be upheld if it denies associational rights. *Williams v. Rhodes*, 393 U.S. 23 (1968); *Kusper v. Pontikes*, 414 U.S. 51 (1973). Public employment cannot be made contingent upon the abdication of associational rights. *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Elrod v. Burns*, 427 U.S. 347 (1976). Section 2.02 of the Texas Optometry Act classifies the state's optometrists on the basis of their association or non-association with TOA and on the of that classification denies non-TOA optometrists any opportunity to attain majority membership or majority representation on the Board. This invidious discrimination violates the non-TOA member's right of association as protected by the First Amendment and denies him the equal protection of the la[illegible]

In *Turner v. Fouche*, 3[illegible] U.S. 346 (1970) this Court struck down the requirement that appointed school board members be freeholders. The Co[illegible]t, in discussing the opportunity to hold appointive off[illegible]ated:

> We may assume that the appellants have no right to be appointed to the Taliaferro County board of education. But the appellants and the members of their class do have a federal constitutional right to be considered for public service without the burden of invidiously discriminatory disqualifications. The State may not deny to some the privilege of holding office that it extends to others on the basis of distinctions that violate federal constitutional guarantees.

396 U.S. at 362-363.

The "invidiously discriminatory disqualifications" of § 2.02 not only violate the federal constitution guarantee of freedom of association but also violate the federal constitutional guarantee of freedom of speech. Membership in TOA means that an optometrist has executed a promise to abide by the AOA-TOA Codes of Ethics and Rules of Practice. (App. 399-416). No price advertising is permitted under these codes and rules. In order to join TOA an optometrist must abdicate in advance his right to engage in truthful price advertising. Since TOA membership is the prerequisite to majority membership on the Board, that majority membership, accompanied by majority representation, is conditioned on an optometrist's abdication of his First Amendment rights. Dr. Rogers and other non-TOA optometrists have the right to be considered for majority membership on the Board without the burden of the discriminatory disqualification found in § 2.02.

It has been recognized by this Court that a public school teacher cannot constitutionally be compelled to relinquish his First Amendment rights as a condition of his employment. *Pickering v. Board of Education,* 391 U.S.

563, 568 (1968). Similarly, the TOA super majority requirement of § 2.02 conditions majority membership and majority representation on the Texas Optometry Board on an optometrist's relinquishment of his right to disseminate truthful price information to the consuming public and violates the Equal Protection Clause of the Fourteenth Amendment.

The state must show a compelling interest in sustaining the discriminatory classification of § 2.02. In this case the state has asserted that its interests lie in insuring proper regulation of visual care providers and maintaining high standards of care. The state argues that for the Optometry Act to be properly enforced the control of the Board must be vested in TOA. (Motion to Affirm on Behalf of the Defendant Board Members in No. 77-1164 at page 4). Before one can accept the state's argument that control must be vested in TOA to further its interests in high standards of visual care one must impute to non-TOA optometrists a disposition not to enforce the Act. However, just as mere differences of political persuasion may not legitimately be used to impute such behavior, *Elrod v. Burns*, supra, 427 U.S. at 365, mere differences over the economics and cosmetics of the profession may not legislatively be used.

Even if one accepted the state's contention that the classification found in § 2.02 furthers its interest in quality eye care, although that contention is not supported by the evidence in this case, it would still be constitutionally infirm since the means the state uses to achieve its legitimate interests cannot be permitted to encroach upon significant First Amendment rights when less restrictive means are available to satisfy its interests. *Kusper v.*

Pontikes, 414 U.S. 51, 58-59 (1973). The state has available to it a broad range of alternative methods to insure that the members of the Board are qualified and will enforce the Act free from outside influences. Indeed, the provisions of § 2.02 not challenged in this case do exactly that without drawing invidiously discriminatory classifications that abridge associational and commercial free speech rights.

There is no showing that the invidiously discriminatory classification set forth in § 2.02 furthers any legitimate state interest. In any event, it constitutes an impermissible means to further any legitimate state interest since it encroaches upon First Amendment rights when less restrictive means are available to satisfy any interest the state might have. The conditioning of majority membership and majority representation on the Board solely on membership in TOA violates protected First Amendment rights of association and speech. It denies Dr. Rogers and all other optometrists similarly situated the equal protection of the laws as guaranteed by the Fourteenth Amendment. The requirement of § 2.02 that at least two-thirds of the Board members be members of TOA must, therefore, be declared unconstitutional and its enforcement must be enjoined.

II.

THE PURPORTED "RATIONAL BASES" FOR § 2.02 ARE REFUTED BY THE EVIDENCE IN THE RECORD

Since the discriminatory classification infringes upon the associational and free speech rights of non-TOA members, it can be sustained only if the state can show a com-

pelling state interest. *Williams v. Rhodes,* 393 U.S. 23 (1968). The three-judge court, however, adopted the less stringent standard applied by this Court in cases involving purely economic regulations. 438 F. Supp. at 432-433. While Dr. Rogers would not agree that this is the applicable standard for review of § 2.02 under the Equal Protection Clause, even under this less stringent equal protection test the classification of § 2.02 must fall since it is wholly arbitrary. *New Orleans v. Dukes,* 427 U.S. 297 (1976).

The three-judge court accepted the three "rational bases" for § 2.02 asserted by TOA. Those "rational bases" are:

> (1) TOA members are more likely to be economically independent than non-TOA members.
>
> (2) TOA members have a greater likelihood of emphasizing the highest quality of eye care, as compared to non-TOA members; and
>
> (3) TOA members are more prone to enforce the Texas Optometry Act than are non-TOA members.

438 F. Supp. at 432.

An analysis of these asserted rational bases in light of the evidence before the Court will confirm the testimony of Dr. E. Richard Friedman, current chairman of the Texas Optometry Board, former president of TOA and defendant-appellee in this case, who testified in response to a question by counsel for Dr. Rogers:

> Q. Well, what is the rational relationship in your mind between a four-two majority and the interest of the people of Texas?
> A. There is none. I have no rational relationship. I think any man that is on the Board, if he is

sworn to uphold the law and to enforce the law, that is what he is there for, no matter what he belongs to.

Q. That is my question. What way does membership in TOA render you better able to serve than non-TOA membership?

A. Not in any manner.

(App. 381).

The first asserted rational basis is that TOA members are more likely to be economically independent than non-TOA members. The testimony of Dr. Hugh Sticksel, defendant Board member points out, however, that there are instances where TOA members as employees or associates of other TOA members might also be subject to economic pressures which might affect their service on the Board. (App. 266-270). As Dr. Sticksel testified, if the interest of the state is to insure that the Board member has no economic pressures asserted against him the only objective criteria would be to distinguish between sole practitioners and all other optometrists. The criteria established, TOA versus non-TOA, cannot rationally be expected to further the purported aim of the classification.

In any event, Article 6252-9B, Texas Revised Civil Statutes, already imposes strict standards of conduct for all public officials, including members of the Texas Optometry Board. Those standards require disclosure of interests in business entities subject to regulation by a regulatory agency such as the Texas Optometry Board and further prohibit the exercise of official powers and duties for the benefit of another in return for some favor or benefit to the public official. *Id.*, §§ 5 and 8.

The testimony of Dr. Robert Shannon, relied upon heavily by TOA in its Motion to Affirm or Dismiss, does little more than establish that Dr. Shannon would not have made a good Board member since he testified that he would expect any optometrist employed by him who might serve on the Board to further Dr. Shannon's interests. (App. 159). Dr. Shannon is now a member of TOA, (App. 100), and unless he has changed since joining TOA one might expect that he would exert the same economic influences on a TOA Board member if that Board member were employed by Dr. Shannon.

The TOA also maintains that contracts entered into between Dr. Rogers and Drs. Moore and McGuire support its contention that TOA members are more likely to be economically independent. There is no evidence that such contracts are widespread among commercial optometrists or that TOA members might not be parties to equally restrictive agreements. Whatever one's judgment might be as to the propriety of these agreements, they do nothing to establish the premise that a TOA member, simply because of TOA membership, is more likely to be economically independent.

The second asserted rational basis is that a TOA member has a greater likelihood of emphasizing the highest quality of eye-care, as compared to non-TOA members. Again this contention is refuted by the evidence, which clearly establishes TOA's true emphasis. The staff report to the Federal Trade Commission, *Advertising of Ophthalmic Goods and Services*, January 1976, at page 61 states, "[t]he basic thrust of associational activities for eye care practitioners has been to foster the aura, if not the reality, of professionalism that comprehensive health care *services*, and not *merchandise* is offered". (Emphasis in

original). The evidence in this case also indicates that the basic thrust of TOA is to foster the aura of professionalism.

The practice Evaluation System of TOA (App. 358-369) awards only 16 out of a possible 100 points for activities directly related to the quality of eye care. The other 84 points are devoted to what one commentator has described as "information constraints".[4] In evaluating optometrists for membership the TOA did not judge optometrists on the quality of eye care rendered to patients but instead judged them on how "professionally" they presented their practice to the public.

In light of this Court's opinion in *National Society Of Professional Engineers v. United States,* ____ U.S. ____ 98 S. Ct. 1355, __ L.Ed.2d __ (1978) an examination of the AOA-TOA Codes of Ethics and Rules of Practice (App. 399-416), which are strictly adhered to by TOA's members, reveals multiple restrictions on any dissemination of price information prior to the patient entering the optometrist's office. Such restrictions may well result in a restraint of trade in violation of § 1 of the Sherman Act, 15 U.S.C. § 1. Under the guise of emphasizing high quality, "professional" care the informational constraints imposed by TOA on its members have restricted the flow of commercial information in restraint of trade. In fact, it is the uncontradicted testimony of Dr. Lee Benham, who has studied the eye care industry extensively and who has no economic interest in the subject matter of this case, that these informational constraints actually de-

---

4. Benham and Benham, *Regulating Through the Professions: A Perspective on Information Control,* 13 JOURNAL OF LAW AND ECONOMICS 421, 426 (1975). The authors examine a very similar point evaluation system used by the Michigan Optometric Association.

crease the quality of eye care since they raise the cost paid by the consumer and price many people who need glasses out of the market. (App. 340-341).

Furthermore, the testimony of Dr. Friedman is that he would expect a patient to get the same proper examination or refraction and prescription at Dr. Rogers' office as the patient would at Dr. Friedman's office. (App. 374). The TOA has relied heavily on the testimony of Dr. James Riley, Jr. in arguing that TOA members are "more apt" to emphasize the highest quality of eye care, but even Dr. Riley admits that TOA members do not have any magical superiority or competence or honesty or integrity or devotion over non-members of TOA. (App. 252).

Finally, TOA asserts that TOA members are more prone to enforce the Texas Optometry Act than are non-TOA members. Again, the evidence establishes that there is no basis for this assertion. TOA's argument is, in effect, that the non-TOA optometrists in Texas have often challenged optometry laws and, consequently, they cannot be expected to enforce the Act as well as TOA members. However, yet another of the defendant TOA Board members, Dr. John Bowen, testified that the TOA majority was not necessary for the proper administration of the Act (Bowen depo. 3-5), just as Dr. Friedman testified that TOA membership does not make an optometrist more likely to enforce the law. In the face of these unqualified admissions from the TOA Board members who are defendants in this lawsuit, it is clear that the last asserted "rational basis" is nothing more than a fallacious, self-serving assumption. Indeed, Dr. Friedman testified that he routinely violates § 5.15(e) of the Act by failing to inform his patients that they may take their prescriptions to a dispensing optician of their choice.

He further testified that the Board, with a four-member TOA majority, has never taken any action for violation of § 5.15(e), although he believed very few optometrists were obeying this statute. (App. 114-115).

Dr. Nelson Waldman, a TOA leader and former chairman of the Optometry Board, testified that the most frequent violation of the Basic Competency Rule, § 5.12 of the Act, found by the Board's investigators, was the failure to test peripheral vision. This is the simplest of all tests and TOA members violated it as well as non-TOA members. Dr. Waldman testified that perhaps the failure to check peripheral vision is more related to human nature than mode of practice. (Deposition of Dr. Nelson Waldman at 71-73).

The State of Texas and TOA have asked the three-judge court below and would ask this Court to impute ill-willed conduct, an unwillingness to enforce the provisions of the Act, to those optometrists who choose not to join TOA simply because those optometrists are not members of TOA. In *Elrod v. Burns,* 427 U.S. 347 (1976) this Court refused to impute ill-willed behavior to Republican employees of the Cook County Sheriff's Office simply because of their party allegiance. In so holding it was noted that:

> The Court has consistently recognized that mere political association is an inadequate basis for imputing disposition to ill-willed conduct. *Keyishian v. Board of Regents,* 385 U.S. at 606-608, 17 L.Ed.2d 629, 87 S. Ct. 675; *Elfbrandt v. Russell,* 384 U.S. 11, 19, 16 L.Ed.2d 321, 86 S.Ct. 1238 (1966); *Wieman v. Updegraff,* 344 U.S. at 190-191, 97 5.Ed. 216, 73 S. Ct. 215.

427 U.S. at 365 (opinion of Mr. Justice Brennan).

Similarly, virtually half the state's optometrists have chosen not to join TOA and support its political activities on behalf of the "professional" mode of practice. To impute a disposition for non-enforcement of the optometry laws to those optometrists on the basis of their choices not to associate with TOA defies reason. The right of an individual to choose with whom he associates or does not associate for political, social or economic reasons is protected by the First Amendment. That choice cannot be used legitimately to impute ill-willed conduct to non-TOA optometrists.

The evidence before the trial court conclusively established the invalidity of each and every asserted rational basis for the arbitrary classification. No set of facts can be conceived that would support the discriminatory classification of § 2.02. The three-judge court's holding that there was a rational basis for the classification is clearly erroneous. Under the test as stated in *New Orleans v. Dukes*, 427 U.S. 297 (1976) the wholly arbitrary classification of § 2.02 denies Dr. Rogers and all other non-TOA optometrists the equal protection of the law.

III.

THE REQUIREMENT THAT AT LEAST TWO-THIRDS OF THE BOARD BE MEMBERS OF TOA DENIES APPELLANT, DR. N. JAY ROGERS, FOURTEENTH AMENDMENT DUE PROCESS

A. Substantive Due Process

The plain effect of the provision of § 2.02 that requires that a minimum of two-thirds of the Texas Optometry Board be TOA members is to create an irrebuttable pre-

sumption that a non-TOA member, simply because he is not a TOA member, is less qualified and competent to serve on the Board. If the six most intelligent, honest, competent and accomplished optometrists in the state were not TOA members only two could be appointed to the Board. And while any one of those six might be chosen to fill one of the two positions available to non-TOA optometrists, the fact remains that four of them will be statutorily presumed to be incompetent to serve.

The fundamental right to associate, whether the association is to advance political, economic, religious or cultural matters, is protected by the Due Process Clause of the Fourteenth Amendment and any statute that has the effect of infringing that right must be subjected to the strictest scrutiny. *NAACP v. Alabama,* 357 U.S. 449, 460-461 (1958).

When a statutory scheme such as § 2.02 arbitrarily favors one class of similarly situated optometrists over another and infringes upon the fundamental associational rights of the disfavored class of optometrists, it denies them due process of law. Cf. *Vlandix v. Kline,* 412 U.S. 441 (1973); *United States Department of Agriculture v. Murry,* 413 U.S. 508 (1973); *Cleveland Board of Education v. LeFleur,* 414 U.S. 632 (1974); *Carrington v. Rash,* 380 U.S. 89 (1965).

While it is of no precedential value to this Court the dissent in *Cook v. Hudson,* 511 F.2d 744, 750 (5th Cir. 1975), cert. granted 424 U.S. 941, cert. dismd. as improvidently granted, 429 U.S. 165, is a well-reasoned example of a similar due process argument. Judge Clark correctly points out that the State cannot avoid due process scrutiny of a statutory scheme that conditions public employment, which is not a fundamental right, on

the abdication of constitutionally protected rights. *Keyishian v. Board of Regents,* 385 U.S. 589 (1967). Similarly, the state in this case cannot avoid due process scrutiny by arguing that there is no protected right to have equal or majority input on a state regulatory body, or even to serve on the regulatory body. There is, of course, no such constitutionally guaranteed right. However, when the state conditions majority membership on the abdication of one's right to *associate* with groups other than TOA and to espouse a different but equally lawful view on the proper mode of practice, it clearly does impose a burden on the exercise of a fundamental right and forces members of the burdened class to abdicate their fundamental rights in order to obtain eligibility to share in the system of rewards that is arranged by the law establishing the political process in question.

Just as the conditioning of public school employment on a person's decision not to send his or her own children to public schools very probably created an irrebuttable presumption that denied due process of law, 511 F.2d at 751-753 (Clark, J., dissenting), so also the conditioning of eligibility for majority representation and majority membership on the Optometry Board on an optometrists' association, or lack thereof, with TOA creates an irrebuttable presumption that non-TOA optometrists are unfit to constitute a majority of the Board simply because they are not members of TOA. The state has shown no compelling state interest in drawing a sweeping enactment that infringes upon fundamental associational rights. In the absence of a compelling state interest, just as § 2.02 denies "commercial," non-TOA optometrists the equal protection of the laws, it equally denies them due process of law as guaranteed by the Fourteenth Amendment.

B. Procedural Due Process

Since the enactment of § 2.02 of the Texas Optometry Act in 1969, the irreversible minimum 4-2 TOA control of the Texas Optometry Board has affected "everything the Board does," including its primary functions of examining and licensing optometric candidates. (Rogers depo. II. 165-168). The record is replete with examples of how TOA's supermajority domination of the Board has directly and adversely affected Appellant Dr. Rogers, and indeed, continues to affect him adversely even as this appeal awaits decision by this Court.

For example, in 1971 the Board, under the chairmanship of TOA leader Dr. Jack Burton, and *at the instance of the North Texas Society of TOA*, formally instituted groundless charges of fraud against Dr. Rogers. (Rogers depo. II. at 131-132, Burton depo. 70-71, Document #5 in set of Optometry Board certified documents). Normal disciplinary procedures were deliberately circumvented in that the Board scheduled a formal hearing and issued a subpoena without the matter (relating to the technical duration of a lease exemption) having been presented to or acted upon by the enforcement committee. (Burton depo. 7, Mora depo. I at 19). Against no other optometrist has the Board invoked such charges or formal procedures. (Burton depo. 72). Not until 1975 did the TOA supermajority of the Board ever allow Dr. Rogers or any other non-member of TOA to serve on an investigating or enforcement committee. (Burton depo. 30, Friedman depo. 104-106, Rogers depo. II at 6-7, 13-15).

In 1973 a baseless censure resolution was adopted against Dr. Rogers by three of the Board's four TOA members as a smokescreen for the improper conduct

during an examination of candidates by the fourth TOA Board member, who subsequently made a public admission and apology for having violated Board rules designed to assure the confidentiality of candidates' names. (Rogers depo. II at 137-139, Burton depo. 39-57). Only when Dr. Rogers considered filing suit was the censure resolution rescinded. (Rogers depo. II at 139). In 1975 Dr. Rogers was again threatened by the TOA supermajority with disciplinary action, including possible license suspension or revocation, growing out of TOA's views concerning optometric advertising and reference to price by dispensing opticians. (Rogers depo. II at 134-135).

Even currently this pattern of threats and intimidation has not quieted. On May 3, 1978, by vote of the four TOA members against the one vote of non-TOA member Dr. Rogers (the sixth board member—likewise a non-member of TOA—abstaining), the Optometry Board adopted a formal resolution requesting the Attorney General of Texas to "proceed to enforce" an anti-advertising provision, § 5.11, of the Texas Optometry Act against one of Dr. Rogers' offices in Houston, Texas. The four TOA-affiliated Optometry Board members confirmed their resolution by forwarding to the Attorney General a letter setting forth its substance, a certified copy of which letter, signed by Board Chairman and former TOA President, Dr. E. Richard Friedman, is included in Appendix "A" to this brief. The resolution and letter are currently the subjects of continuing proceedings in the trial court.

Dr. Rogers, Appellant herein, has repeatedly been forced to incur substantial costs in time and legal expense to defend against these persistent, economically-motivated, TOA-instigated charges. Such recurrent charges, threats, expenses and resultant injury will continue unabated,

however, as they have since 1969, for so long as the TOA supermajority of the Optometry Board persists in employing the guise of "procedural" rulemaking to enlarge upon and alter the meanings of certain advertising and mode of practice-related sections of the Texas Optometry Act.

Specifically, the Board takes it upon itself—notwithstanding § 2.14 of the Act—to issue "Interpretations" of the optometry statutes. In the meantime the TOA supermajority has caused internal procedures to be adopted whereby it becomes impossible, as a practical matter, for a non-TOA dissenter to require the Board to obtain the Attorney General's opinion on the validity of those "Interpretations". (See Rogers depo. II at 131, Mora depo. I at 12, Friedman depo. 33). In short, one vote or two votes in favor of seeking the Attorney General's opinion is never sufficient against the four TOA votes.

In those instances material to this case in which the Optometry Board has divided "TOA 4—Opposition 1 or 2", the issues have been advertising and the transaction of optical business in "commercial" fashion. (App. 280). In particular, the Court will observe that "Interpretations" 6, 7, 9, 10 and 11 constitute *substantive* constructions of the Texas Optometry Act with respect to the "commercial" issues described therein. Each is the product of a 4-2 vote, TOA against non-TOA. Only upon one occasion, that being "Interpretation" 6, did the supermajority allow the Attorney General to pass on the validity of the "Interpretation". Then, ignoring entirely § 2.14's limitation of the Board's rulemaking authority, the Attorney General of Texas held "Interpretation" 6 to be valid and correct enlargement on the meaning of

§ 5.09(a) of the Act, even though that section does not even mention "reference" to price. Attorney General's Opinion No. M-1029 (1971). We now know, of course, that the court below has found the underlying statute, § 5.09(a), in violation of the First Amendment and the State of Texas has not appealed that decision.

Still, after the Attorney General upheld "Interpretation" 6, the TOA supermajority of the Board was convinced, and remain convinced, that they have "the legal power to adopt whatever interpretations they see fit to adopt". (Rogers depo. II at 131). Furthermore, the TOA members of the Optometry Board and the members of the Texas optometry profession at large, as well as dispensing opticians, consider the Board's "Interpretations" to be viable statements of the law. In other words, people are afraid to violate them for fear of retaliation and retribution. (Mora depo. I at 20).

A concrete example of this threat of retribution occurred in 1970. Dr. E. Richard Friedman, now-Chairman of the Texas Optometry Board, longtime TOA leader and an Appellee herein, filed a complaint with the Board alleging that certain newspaper advertising constituted "gross and deliberate violations of *Board interpretations numbers six and seven*" and that he was "being *discriminated against and hurt economically*". (Document #1 in Optometry Board records under official certificate). (Emphasis added). In his testimony nearly six years later, Dr. Friedman still insisted that, in his view, the "Interpretations" give the Board "guidance in our *enforcement* and in *investigation* procedures *and in any action the Board may take.*" (Friedman depo. 40). (Emphasis added).

Similar admissions are found in the testimony of TOA member and former Optometry Board Chairman, Dr. Jack Burton: "I never thought about them as Board interpretations. *I thought of them as the act itself* and I never worried about interpretations". (Burton depo. 37). (Emphasis added). Dr. Sal Mora, a member of the Optometry Board but not a member of TOA, added that the Board advises practicing optometrists that they will be subject to discipline if they violate Board "Interpretations". (Mora depo. I at 20).

This is not a case presenting an attack on benign peer review or other traditional forms of professional self-regulation under which all, or at least a fair cross-section, of licensees enjoy meaningful opportunity for access to and collective influence upon the regulatory process. Rather, at issue herein is an expressly-legislated scheme of state government in which a discrete segment of the Texas Optometry Board controls the exercise of power belonging to the state, but accounts for that exercise essentially only unto persons with whom that segment's members associate and identify privately. The Fourteenth Amendment circumscribes the powers of the state. Under the Due Process Clause of that Amendment the State of Texas may not, by the enactment and operation of § 2.02 of the Texas Optometry Act, arbitrarily deprive Dr. Rogers and similarly-situated persons of their liberty and property.

The vice of § 2.02 is that "at all times at least two-thirds" of the members of a governmental body are required, by the very law that gives them the power to govern, to continue their active participation in a private organization composed of their fellow regulatees that de-

liberately constrains itself through its internal canons from accommodating or developing negotiable responses to the lawful interests of an almost-equally large number of other, likewise-regulated optometrists. Moreover, those disenfranchised optometrists are joined in the excluded class by all those persons and firms engaged in business in Texas as dispensing opticians.

But apart from the reward conferred upon TOA by § 2.02 *all* Texas Optometrists and *all* dispensing opticians, respectively, stand on equal footing under those remaining sections of the Texas Optometry Act that govern the conduct of their respective enterprises. That genuine discernible, articulable economic and philosophical differences separate the "professional" TOA faction and the "commercial" non-TOA faction is not the consequence of either group's disenchantment or noncompliance with laws validly enacted by the legislature, but is instead the result of thousands of people doing business for many years under two very distinct modes historically permitted by law.

By this appeal Dr. Rogers does *not* seek to have the Court declare that *no* TOA member may serve on the Optometry Board, or that only one or two or three TOA members may serve, or that the Texas Legislature must establish some kind of quota system dividing the Board between TOA members and nonmembers on the basis of proportional representation. Instead, this challenge is based on the simple democratic proposition that the Due Process Clause forbids the state institutionally to embrace and perpetuate private factionalism in a manner whereby one lawful side of a debatable issue obtains an irreducible advantage over the other. Cf. *First National Bank of Boston v. Bellotti*, _____ U.S._____, 98 S. Ct. 1407,

1420-21 (1978); *Buckley v. Valeo,* 424 U.S. 1, 48-49 (1976); *City of Eastlake v. Forest City Enterprises, Inc.,* ——— U.S. ———, 96 S. Ct. 2358, 2364 (1976) (State legislature may not delegate its power to a *narrow segment* of the community") (Emphasis in original); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 765 (1976) (If free flow of commercial information is indispensable to resource allocation in a free enterprise system, then it is also essential to formation of intelligent opinion on how that system ought to be *regulated or altered*).

From the opinion below it is obvious that the trial court sought to avoid the procedural due process issues made by the record. The trial court reached, in essence, two conclusions: first, that Dr. Rogers' complaint about the composition of the Optometry Board may not be heard except in the context of a "disciplinary adjudication", which presumes the filing of formal charges against him by the Board; and second, that absent such formal charges, Dr. Rogers may not complain about the past and present conduct of the TOA super-majority because " 'there is no federal constitutional requirement to the effect that legislators and rule makers must be free of bias or interest' ". 438 F. Supp. at 433, quoting *Wall v. American Optometric Association, Inc.,* 379 U.S. 175, 180 (N.D. Ga. Three-Judge Court 1974), *affirmed* 419 U.S. 888 (1974). The trial court then indicated, in dicta, the circumstances under which it believed a procedural due process challenge might become appropriate for review. 438 F. Supp. at 433-34.

Although the trial court sought to distinguish *Gibson v. Berryhill,* 411 U.S. 564 (1973), the distinctions that it

mentioned are immaterial and do not subtract from the current, immediate ripeness of the procedural due process problem for decision by this Court. Furthermore, the portion of the *Wall* holding, summarily affirmed by this Court, from which the trial court quoted is either irrelevant to this case or, alternatively, erroneous when extended to the facts of this case, in which event it should not now be followed. On the other hand, separate portions of the *Wall* decision do furnish strong support for the proposition that Dr. Rogers need not undergo once more the institution of formal adjudicative proceedings in a state tribunal in order to gain standing to present his claim to a federal court.

The record indisputably establishes that, since 1969, Dr. Rogers has been selectively subjected by the TOA supermajority to repeated threats of action against his optometry license because he has chosen, with great success, to conduct his business "commercially." And those threats have not yielded the result TOA desires does not diminish their persistency or the consequent strong circumstantial likelihood that they will continue into the foreseeable future, unless restrained by the Court. Even at present the TOA supermajority has caused a pending threat of legal action to be lodged against Dr. Rogers, see Appendix "A", because he has elected to exercise what in all likelihood is his First Amendment right to advertise optometric goods and services.

The court below reasoned that *Gibson* and *Wall* do not apply because "those cases were brought *after* the optometry boards in question had brought charges against the optometrist plaintiffs . . ." 438 F. Supp. at 433 (Emphasis in original). In *Wall*, however, the three-judge court had properly noted:

> [T]he board asserts that plaintiffs who are not the subject of pending license revocation proceedings do not have standing to challenge any of the rules. This position is clearly refuted both by the Supreme Court's recent decision in *Steffel v. Thompson*, 415 U.S. 452, 94 S. Ct. 1209, 39 L. Ed. 2d 505 (1974) and by the congressional scheme of allowing anticipatory challenge to state proceedings in certain circumstances. If the mere lack of pending state proceedings served to deprive plaintiffs of standing to contest regulatory schemes, plaintiffs would invariably be trapped between Scylla and Charybdis of standing and the doctrine of equitable restraint, discussed below. Such a system would defeat Congress' policy of allowing anticipatory challenges to state proceedings.

379 F. Supp. at 182. As in *Steffel v. Thompson* and *Wall*, supra, the plaintiff herein, Dr. Rogers, requested a declaratory judgment. (App. 11). In preparing its memorandum opinion the court below apparently overlooked this feature of the case. But in any event, the currently-pending threat of legal action, issued by resolution of the Optometry Board's four TOA members, makes § 2.02 of the Act ripe for review of Dr. Rogers' claim at this time.

The trial court also attempted to distinguish *Gibson* and *Wall* on the grounds that the optometry boards in those cases possessed rulemaking power, whereas § 2.14 of the Texas Optometry Act authorizes the Texas Optometry Board to adopt "procedural rules only". See 438 F. Supp. at 433. Presumably Board "Interpretation" 6, which forbade Texas optometrists to make any "reference to price", and which was upheld by the Texas Attorney General, constituted such a "procedural" rule.

Actually, the court below made a very dangerous and questionable assumption about the weight that the apparent meaning of one state statute should be given in testing the constitutionality of the Optometry Board composition prescribed by another statute. The defendants in the *Wall* case made a similar argument in an effort to get the federal court to abstain from decision. The Court rejected the argument:

> It is true that there are certain issues of state law in the case which, if decided favorably to the plaintiffs, would dispose of the case. For example, plaintiffs argue that the rules they challenge are beyond the scope of legislative authority which has been delegated to the board by the legislature. If this contention were upheld, the rules would be struck down and the other issues in the case would be moot. But that is not enough. It is true in many cases that there are state law contentions which could dispose of the case. The fact remains that plaintiffs allege a violation of their federal constitutional rights, for which violation Congress has provided a forum in the federal courts.

379 F. Supp. at 183. In effect, the court below might as well have "abstained" from addressing the constitutionality of § 2.02, even though no party requested abstention or equitable restraint, for in its reliance on the Board's apparent lack of rulemaking authority the trial court, for all practical purposes, abdicated the question presented. The trial court also overlooked the uncontroverted facts that, authorized by state law or not, the Texas Optometry Board promulgates substantive "Interpretations" of the Optometry Act, distributes those "Interpretations" to regulated licensees and dispensing opticians, advises those

persons that action may be taken against them for violations of the "Interpretations", and — according to TOA members of the Board — relies on the "Interpretations" for guidance in "enforcement", "investigation" and "in any action the Board may take". (Friedman depo. 40).

For its final distinction of *Wall* and *Gibson*, the trial court indicated that it found significant the fact that in thoses cases *all* optometry board members were also members of a state association akin to TOA, whereas in Texas one-third (numerically two) of the present Optometry Board members do not belong to TOA. 438 F. Supp. at 433. For a variety of reasons this distinction is immaterial to the procedural due process deficiency of § 2.02 of the Texas Optometry Act.

In the first place, § 2.05(c) of the Act provides that four members shall constitute a quorum for transaction of Board business. Thus, a quorum for any action they desire to take is present any time the four TOA members attend a Board meeting. If TOA does not desire certain action to be taken by the Board, then it is a simple matter for any three of its TOA members to miss the meeting, as occurred continuously for two years between 1967 and 1969 until the Texas Legislature succumbed to TOA's demand for control of the Board. (See Rogers depo. I at 79-80).

Next, four TOA votes are always sufficient against one or two non-TOA votes to effect official Board action and policy as TOA wants it. The Optometry Board's "Interpretations" concerning advertising and mode of practice, described previously, provide prominent examples. Other examples, consisting of about sixty 4-2 votes, TOA against non-TOA, relating to various mode of

practice issues, may be found in the official Minutes of the Texas Optometry Board from 1969 through 1975. Those Minutes, which are part of the record, are simply too voluminous to be sensibly condensed in this brief.

Third, the trial court failed to take account of the fact that, although § 2.02 does not vest TOA with 100% of the Board seats, it still fails to allow Board membership to *any* dispensing optician who is not also licensed as an optometrist. This holds true even though the Optometry Board regulates dispensing opticians. Meanwhile, the interests of those regulatees certainly cannot be said to be served, reflected or even respected by the TOA supermajority, for TOA's Code of Ethics and Rules of Practice strictly prohibit any member from publicizing or holding himself forth as an optician.

Of utmost importance, however, § 2.02 erects a scheme that insures that in any disciplinary or delicensing proceeding a non-TOA defendant will be judged by a clearly biased Board, a minimum two-thirds majority of which will also have substantial pecuniary interests at stake. Under the record before this Court there can be no room for doubt that the four TOA members could not constitutionally sit in judgment of a non-TOA optometrist or dispensing optician in an adjudicative matter. The proceeding itself, infected by the "professional" bias and economic interest of the TOA supermajority, would violate the procedural due process holdings of *Gibson* and *Wall*, supra.

It is simply inconceivable that all four TOA members, having consciously, deliberately promised to abide by the AOA-TOA Codes of Ethics and Rules of Practice as reflecting the best interests of optometrists and the public,

could lay their philosophical biases entirely aside when serving as Optometry Board members. The evidence establishes that they have not been able to do so over the past nine years. Compare *Taylor v. Hayes,* 418 U.S. 488, 501-02 (1974) with *Hortonville Joint School Dist. No. 1 v. Hortonvillle Education Assn.,* __U.S.__ 96 S.Ct. 2308, 2314 (1976) and *Withrow v. Larkin,* 421 U.S. 35, 54-55 (1975). It is equally inconceivable that those TOA Board members could avoid all "substantial" pecuniary interest. According to this Court's decisions, "Every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused denies the latter due process of law". *Tumey v. Ohio,* 273 U.S. 510, 532 (1927); *In re Murchison,* 349 U.S. 133, 136 (1955). And as Judge Morgan observed in *Wall,* "Those patients would go somewhere, and there is a substantial likelihood that many of them would go to the [TOA Board members] with their patronage". 379 F. Supp. at 188-89.

It therefore follows, necessarily, that the four TOA members of the Texas Optometry Board could not constitutionally sit in judgment of their principal competitor, Dr. Rogers, who is himself a Board member with over twenty successive years of distinguished service. Yet it is against Dr. Rogers that the TOA supermajority's threats, notices, charges, demands, hearings and pleas for legal action have repeatedly been brought and currently pend. (See Appendix "A" to this brief).

In the trial court the Appellees, as defendants, argued that the problem could be cured by two TOA members "disqualifying themselves." (Defendants' Trial Brief at

24). Such an offer is nothing less than a judicial admission of bias and economic interest on the part of the Optometry Board's TOA members. It also overlooks the requirement of state law that four members are necessary for a quorum, not to mention that a similar offer was held "not good enough" in *Wall*. 379 F. Supp. at 189. Furthermore, as the Court below correctly observed, "a constitutionally fatal bias in the statutory composition of a tribunal is not necessarily remedied by an offer of that tribunal to abdicate its statutory function." 439 F. Supp. at 434.

There can be no question that Dr. Rogers' offices have hundreds of thousands, perhaps millions, of optometric patients and that he operates the largest dispensing opticianry firm in the State of Texas. If his license or his good name and reputation were placed in jeopardy—even temporarily, directly or indirectly—at the instance of the Optometry Board's four TOA members, those patients and customers would surely go somewhere—many in all likelihood to the TOA Board members—for examinations, lenses and frames. Conclusively, this risk of pecuniary interest is sufficiently "substantial" under *Gibson, Wall, Tumey* and *Ward v. Village of Monroeville*, 408 U.S. 57 (1972), to peremptorily disqualify all four of the Texas Optometry Board's TOA members from instituting or instigating any action of an adverse nature against Dr. Rogers, in any manner whatever. The potential for abuse is greatly multiplied by TOA's intransigent philosophical bias against Dr. Rogers' "commercial" mode of practice.

In summary, the distinctions drawn by the Court below deserve no weight, for as between Dr. Rogers and the

Board's perpetual TOA supermajority there is no way to escape the procedural due process defect. Dr. Rogers' only meaningful recourse is to the federal courts for protection of his license, which is "property," see *Bishop v. Wood,* 426 U.S. 341, 344 & n. 7 (1976) and *House of Tobacco, Inc. v. Calvert,* 394 S.W.2d 654, 657 (Tex. 1965), and for protection of his good name and reputation, which constitute "liberty." *Board of Regents v. Roth,* 408 U.S. 564, 573-74 (1972). An opportunity to "clear his name" before the Board as it is presently composed would represent a wasteful and meaningless exercise. The problem is not remedied by the availability of judicial review, *de novo* or otherwise, in a state court. *Gibson,* supra, 411 U.S. at 577 & n. 16. Section 2.02 of the Texas Optometry Act is, therefore, a due process derelict. The Attorney General of Texas, however, joined by TOA, chooses to persist in defending § 2.02. See also Attorney General's Opinion No. H-607 (1974). Accordingly, the claims, defenses and interests of all parties are fully displayed, the issues are ripe, and § 2.02 is now due to be declared unconstitutional.

The only palpable obstacle to the relief now sought by Appellants is this Court's memorandum summary affirmance, 419 U.S. 888 (1974), of the three-judge court's entire judgment in *Wall,* by which the court below apparently felt itself bound to some degree under *Hicks v. Miranda,* 422 U.S. 332 (1975). Among a variety of other complaints, the plaintiff optometrists in *Wall* had challenged certain rules, adopted by the Georgia State Board of Examiners in Optometry, that prohibited the practice of optometry in an office for less than four hours per week and further prohibited the practice of optometry in an office "reasonably identifiable" with a mercantile

establishment, retail optical house or dispensing optician. 379 F. Supp. at 179-80 & n. 5.

Those rules, which were adopted by the Georgia board after notice and hearing in apparent compliance with all federal and state due process requirements, were attacked on the grounds that they were beyond the state's power in violation of substantive due process; that they were penal in nature and void for vagueness; that they confiscated plaintiff's property without due process; and that they exceeded the scope of the state legislature's delegable powers. 379 F. Supp. at 187-88.

Relying on *Williamson v. Lee Optical of Oklahoma,* 348 U.S. 483 (1955) and *North Dakota State Board of Pharmacy v. Snyder's Drug Stores,* 414 U.S. 156 (1973), the three-judge court rejected plaintiffs' arguments and held that the rules themselves, though enacted by a fatally-interested board that was constitutionally incompetent to enforce them, represented a valid exercise of state police power. 379 F. Supp. at 188, 190-91. It was in connection with this holding that the *Wall* court issued its gratuitous comment, quoted by the trial court in this case, that there is "no *federal constitutional* requirement to the effect that legislators and rule makers must be free of bias or interest." *Id.* at 180 (Emphasis in original).

The Appellees herein would now have this Court conclude that, by its unexplicated summary affirmance of *Wall,* this Court necessarily decided that the Georgia board's composition was *not* unconstitutional, or otherwise this Court would not have left standing the portion of the judgment that upheld the validity of the board's rules. For the following reasons, however, Appellees' contention is inapplicable in the context of this case or, al-

ternatively, this Court's summary affirmance in *Wall* was incorrectly entered and the portion of the *Wall* result now in question ought not be extended to this case.

First, the thrusts of both the complaint and the holding in *Wall* with respect to the board's rules was the scope of substantive state police power. The *Wall* plaintiffs also attacked the board's composition on *procedural* due process grounds, but this challenge implicated the challenged board rules only in that it happened to be those rules that the unconstitutionally-composed board intended to apply and enforce. From a procedural due process standpoint the Georgia board might as easily have sought to enforce some other rule or, as in *Gibson,* a state statute restricting certain optometrists' mode of practice. See 411 U.S. at 567-68. Such a difference certainly would not have affected the outcome of the procedural due process litigation. By the same token, the outcome under *Williamson* and *Snyder's Drug Stores* probably would have been the same if some other rule or statute had been challenged on *substantive* grounds, unless such other rule or statute also violated the First Amendment and was challenged on that basis as well. Cf. *Virginia Pharmacy,* supra, 425 U.S. at 755-56 & n. 13.

Under the foregoing analysis the three-judge court's decision and this Court's summary affirmance in *Wall* are explicable on principled grounds. This Court has had occasion to observe that "[a]scertaining the reach and content of summary actions may itself present issues of real substance . . ." *Hicks v. Miranda,* supra, 422 U.S. at 345 n. 14. Further, a summary affirmance by this Court merely affirms the judgment and resolves the issues between the parties, "but not necessarily the reasoning by which it was reached." *Fusari v. Steinberg,* 419 U.S. 379,

391-92 (1975) (Chief Justice Burger concurring). The thrust of the complaint and the appeal in this case differs significantly from the portion of *Wall* under present consideration. In this case Appellants have not contended that any rule, "Interpretation" or other exercise of police power by the Texas Optometry Board or, indeed, by the Board's TOA supermajority, exceeded *substantive* constitutional limitations.

Accordingly, Appellants herein need not attack, defend or otherwise address the sweeping assertion that the Constitution does not require lawmakers to be free of bias or interest, except to demonstrate its irrelevancy. Specifically, the problem in this case is the same one that confronted the courts in *Gibson*s a "State Board of Optometry . . . so biased by prejudgment and pecuniary interest that it could not constitutionally conduct hearings looking toward the revocation of [Appellant's] licenses to practice optometry." 411 U.S. at 578.

The Texas Optometry Board itself is a procedural due process nullity. This condition will persist for so long as TOA continues to insist that its members employ no "commercialism," for so long as AOA and TOA actively oppose all forms of advertising and "commercialism," for so long as the "local societies" of TOA continue to refuse membership to optometrists (and dispensing opticians) whose practices are perfectly lawful but are tainted by "commercialism," and for so long as the Texas Legislature suborns and institutionalizes this system of anticompetitive discrimination by vesting TOA with perpetual supermajority control over the regulatory licensing Board. One or the other —— TOA or § 2.02 of the Texas Optometry Act — has to fall. Section 2.02 is within the reach of

the Due Process Clause and of this Court; TOA, by itself, is not. Therefore, the state statute, in a constitutional sense, is the offender and is due to be struck down.

Second, but in the alternative, this Court erred by summarily affirming the entire judgment in *Wall*. If these cases are to be characterized categorically, and the categorical question to be asked is whether "legislators and rule makers must be free of bias or interest," then the correct answer must be "sometimes." Specifically, the answer must be in the affirmative in this case. Surely the Due Process Clause imposes some limits on the extent to which a state can authorize private parties to exercise the powers of government for their especial benefit and thereupon wash its hands of repressive, discriminatory or anticompetitive consequences. Cf. *Marsh v. Alabama*, 326 U.S. 501 (1946); *City of Eastlake*, supra, _____ U.S. at _____, 96 S.Ct. at 2364; *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 791-92 (1975). This case affords this Court an opportunity to indicate those limits, in the event the Court finds *Wall* indistinguishable.

Upon plenary consideration of cases before it, this Court is not bound by principles of *stare decisis* to follow or extend its own prior summary affirmances. *Gibson v. Berryhill*, supra, 411 U.S. at 576-77; *Colorado Springs Amusements, Ltd. v. Rizzo*, _____ U.S. _____, 96 S.Ct. 3228 (1976) (Brennan, J., dissenting from denial of certiorari); *Fusari v. Steinberg*, supra (Chief Justice Burger concurring). Those dispositions "are not of the same precedential value as would be an opinion of this Court treating the question on the merits." *Edelman v. Jordan*, 415 U.S. 651, 671 (1974). Thus, in no event can *Wall* foreclose a thorough consideration of the procedural due process issues presented by this case.

Following such consideration, Appellants respectfully submit, this Court will be firmly satisfied that § 2.02 of the Texas Optometry Act denies Appellant, Dr. N. Jay Rogers, procedural due process of law, for which reason the applicable portion of the judgment below should be reversed or, alternatively, vacated and remanded for further proceedings consistent with the Court's opinion.

IV.

THE REQUIREMENT THAT AT LEAST TWO-THIRDS OF THE BOARD BE MEMBERS OF TOA INFRINGES UPON THE SENIOR CITIZENS' FIRST AMENDMENT RIGHTS TO RECEIVE VALUABLE COMMERCIAL INFORMATION

The Senior Citizens successfully challenged § 5.09(a) of the Act, a prohibition of price advertising by optometrists, before the three-judge court. The three-court judge based its holding that § 5.09(a) is unconstitutional on the case of *Bates v. State Bar of Arizona*, _____ U.S. _____, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977). The Senior Citizens also challenged § 2.02 on First Amendment grounds but this claim was dismissed as moot by the three-judge court in view of its ruling on § 5.09(a). 438 F. Supp. at 432 n. 4. However, although § 5.09(a) has been declared unconstitutional, the challenged portion of § 2.02 still serves as an impermissible restraint on the First Amendment rights of the Senior Citizens to receive valuable price information from optometrists.

By vesting a perpetual minimum two-thirds majority of the Texas Optometry Board in TOA, § 2.02 effectively insures that at all times at least two-thirds of the Board

members will faithfully adhere to and propogate the AOA-TOA Codes of Ethics and Rules of Practice. All TOA members are bound to continue to abide by those rules pursuant to the By-Laws of TOA, Article XIV, § 1 (13). The supplement to the AOA Code of Ethics deems unethical:

> Advertising of any character, which includes or contains any fee whatsoever, or any reference thereto, or any reference to the cost to the patient, whether related to the examination or the cost or fee for lenses, glasses, frames, mountings or any other optometric services, article or device necessary for the patient. (App. 406).

Thus, supermajority control of the Board is irreversibly vested in an organization that strictly prohibits its members from engaging in any form of price advertising. By giving its imprimatur to TOA, the State of Texas encourages membership in a private organization of providers that denies its members the right to engage in truthful price advertising of the goods and services they provide. Any action by the state that contributes to the strength and growth of TOA correspondingly decreases the amount of protected commercial information that can be received by the Senior Citizens, in spite of their First Amendment right to receive it freely. *Virginia Pharmacy*, supra; *Bates*, supra.

When candidates for licenses to practice optometry must be approved by a TOA-dominated Board and when practicing optometrists can lose their licenses on the vote of the four TOA members of the Board, the state has placed direct and substantial pressures on those candidates and licensees to conform their behavior to the

mode of practice for which TOA stands. These pressures are not merely theoretical, but are very real. (See Deposition of Dean Chester Phieffer at 7-8, 16, 26, 30, 33-34, 46-47, 59). And conformity to the TOA mode of practice means foregoing all advertising, including price advertising. By this network of formal and informal restraints the State of Texas has seriously eroded the First Amendment rights of the Senior Citizens to receive protected price information concerning optical goods and services. There has been no showing by the state or by TOA that those restraints are necessary to deal with some evil that the state may legislate to correct. Accordingly, the Senior Citizens are entitled to have § 2.02 stricken on First Amendment grounds.

In the case of *United Mine Workers v. Illinois State Bar Association*, 389 U.S. 217 (1967), this Court invalidated a decree enforcing a state's policy against unauthorized law practice even though the decree did not directly affect anyone's exercise of constitutionally protected rights. The vice found in the decree was that it substantially impaired the First Amendment rights of a labor union by prohibiting the union from employing salaried attorneys to represent its members in connection with workers' compensation claims. There was no showing that this prohibition was necessary to protect the state's interest in high standards of legal ethics.

Similarly, § 2.02, although perhaps it does not directly deny protected First Amendment rights, substantially impairs the rights of the Senior Citizens to receive valuable commercial information. The state has deliberately vested the power to control the licensure of optometrists and the enforcement of the Optometry Act in an organization whose members are prohibited by its Codes of

Ethics and Rules of Practice from disseminating the commercial price information to which the Senior Citizens are constitutionally entitled. The state explicitly extends its blessing to TOA and implicitly encourages TOA membership. The state thereby endorses TOA's price advertising restrictions, prohibitions that would violate the First Amendment if enacted by the state directly.

The state has nowhere shown that § 2.02's requirement that at all times at least two-thirds of the Board members be TOA members is necessary to protect its interests in maintaining high professional standards among optometrists. High professional standards are substantially guaranteed by a variety of other statutes with which Appellants herein have no quarrel. (See Motion to Affirm filed by Dr. N. Jay Rogers and the Senior Citizens in Nos. 77-1163 and 77-1186 at 24-27). Yet, that requirement operates to impair substantially the rights of the Senior Citizens to receive truthful price information from easily half, or at least 480, of the state's optometrists. Since § 2.02 thereby denies the Senior Citizens their First Amendment rights its unconstitutionality must be declared and its enforcement must be enjoined.

V.

THE REQUIREMENT THAT "AT ALL TIMES AT LEAST TWO-THIRDS" OF THE BOARD MUST BE TOA MEMBERS CONFLICTS WITH § 1 OF THE SHERMAN ANTITRUST ACT AND THEREFORE VIOLATES THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION

In pertinent part, Article VI of the Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the Supreme Law of the Land; * * * *

The relevant law of the United States is § 1 of the Sherman Act, 15 U.S.C. § 1, which declares illegal:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, * * * *

It should now be clear that this Court's landmark decision in *National Society of Professional Engineers v. United States*, __ U.S. __, 98 S. Ct. 1355, __ L.Ed.2d __ (April 25, 1978), rendered eight days *after* this Court noted probable jurisdiction in this case, lays a valid predicate for seriously questioning the composition of the Texas Optometry Board, as prescribed by § 2.02 of the Optometry Act, from a pure Supremacy Clause standpoint as well as from the originally-urged due process, equal protection and free speech perspectives. The emergence of the Supremacy Clause in all likelihood offers a viable ground upon which § 2.02 may be tested without the necessity to reach the substantive constitutional issues.

The conflict between § 2.02 of the Texas Optometry Act, which irrevocably bestows the powers of government upon a private corporate organization whose "ethical" canons openly and notoriously forbid virtually all forms of advertising and commercialism in optometry, and the most basic policies underlying § 1 of the Sherman Act is manifestly obvious. In *Professional Engineers* this Court found a flagrant violation of § 1 of the Sherman Act in a professional society's "ethical" rule that pro-

hibited "the submission of any form of price information to a prospective customer which would enable that customer to make a price comparison on engineering services." ____ U.S. at ____, 98 S. Ct. at 1361, ____L.Ed.2d at ____. (Footnote omitted).

No less than the anti-competitive bidding rule invalidated by this Court in *Professional Engineers* suppressed price competition among the society's members and thereby denied cunsumers the benefits of free and open competition, the Codes of Ethics and Rules of Practice of AOA-TOA prohibit *all* price advertising, most advertising of any other type, the number of offices (no more than three) in which a member may hold an interest, the locations of offices, the use of signs and displays, and the transaction of business as a dispensing optician. (App. 399-416). Moreover, TOA takes great pride in its members' rigid observance of these AOA-TOA competitive restrictions. See Motion to Affirm or Dismiss filed herein by TOA, at 10, 17-18.

In this very case the intervenors-Appellants, W. J. Dickinson, individually and as President of the Texas Senior Citizens Association, Port Arthur, Texas Chapter, have the requisite standing to press a Supremacy Clause challenge to § 2.02 of the Texas Optometry Act. As representative members of the prescription eyewear-consuming public in Texas, the Senior Citizens are denied valuable competitive information and techniques that one-half (or about 480 to 500) of all Texas-licensed optometrists —i.e., those who belong to TOA—would be free to disseminate and utilize both as a matter of federal antitrust law and the First Amendment *but for* the restrictions contained in the AOA-TOA Codes of Ethics and Rules of

Practice. See *Virginia Pharmacy*, supra, 425 U.S. at 756-57 and cases cited. There can likewise be no serious question that those restrictions "substantially affect" interstate commerce under the test enunciated in *Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738 (1976), in that they tend to suppress activity in the marketplace for ophthalmic merchandise and ophthalmic equipment, most of which is manufactured in and shipped from states other than Texas. And as Dr. Lee Benham testified, without contradiction or equivocation:

> Consumers benefit from having more information about their options. If they do not know about alternatives, they cannot respond to them. If the amount of information to consumers is limited, it has the effect of reducing competition which results in higher prices to consumers.

(App. 335).

The Senior Citizens now desire to assert that the State of Texas, through § 2.02 of the Texas Optometry Act, may not "retard, impede, burden, or in any manner control, the operation of the laws [in this case the Sherman Act] enacted by Congress." *McCulloch v. Maryland*, 4 Wheat. 316, 436, 17 U.S. 316, 436 (1819). Section 2.02 is invalid under the Supremacy Clause because it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Perez v. Campbell*, 402 U.S. 637, 649 (1971); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

Appellants respectfully suggest that the unfolding Supremacy Clause features of this case possess convincing merit. Nonetheless, Appellants fully realize that those

merits ought to be, but have not been, considered in the first instance by the trial court. Upon their consideration certain subsidiary issues—for example, the relevance of the "state action" antitrust exemption of *Parker v. Brown,* 317 U.S. 341 (1943), as limited in *Goldfarb,* supra, 421 U.S. at 791-92, and *Cantor v. Detroit Edison Co.,* ____ U.S.____, 96 S.Ct. 3110, ____L.ed.2d____ (1976)—are likely to arise. This Court is not in a position to resolve those matters without the benefit of additional proceedings, findings of fact and conclusions of law in the lower court. Accordingly, Appellants respectfully urge this Court to remand the case to the trial court for further proceedings. The three-judge court may then assign the Supremacy Clause question to a single District Judge for decision in accordance with *Rosado v. Wyman,* 397 U.S. 397, 403 (1970), and *Swift & Co. v. Wickham,* 382 U.S. 111 (1965).

In urging this Court to remand, Appellants do not seek a novel disposition of the case. Specifically, 28 U.S.C. § 2106 provides that, incident to its appellate jurisdiction, this Court has the power to "vacate . . . any judgment" brought before it and to "remand the cause" and to "require such further proceedings to be had as may be just under the circumstances." This Court has stated that the provisions of this section are broad enough to give much latitude in fashioning its response to a motion for remand, *United States v. Shotwell Manufacturing Co.,* 355 U.S. 233 (1957), and has recognized that in the exercise of its appellate jurisdiction the Court is bound to recognize any change in law or in fact which has supervened since the entry of the judgment before it. *Patterson v. State of Alabama,* 294 U.S. 600 (1935).

When a potentially-controlling decision of this Court is rendered after the judgment in the case before it for review, the subsequent decision can constitute such a change in law as to justify a remand for further proceedings. *In re Whittington,* 391 U.S. 341 (1968), is an example of a case where this Court remanded in order for the state supreme court to conduct further proceedings in light of the decision of *In re Gault,* 387 U.S. 1 (1967). The logic of *Whittington* is made even more compelling in this case since the supervening change in decisional law presents a non-constitutional ground for decision. Cf. *Ashwander v. TVA,* 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring).

The case of *Youakim v. Miller,* 425 U.S. 231 (1976) presents a set of facts very similar to those currently before the Court. There the Court vacated and remanded to the three-judge court for further consideration in light of a subsequent Department of Health, Education and Welfare Program Instruction and the Supremacy Clause of the United States Constitution. The HEW instruction was issued after the filing of appellants' Jurisdictional Statement in *Youakim.* The appellants had not presented the Supremacy Clause question to the District Court just as Appellants did not present the Supremacy Clause issue to the three-judge court in this case. Still, this Court vacated and remanded consistent with its "usual practice of avoiding decisions on constitutional matters if a case can be resolved on other grounds." 425 U.S. at 236. By this Court's vacating and remanding the judgment, the District Court is required first to decide any statutory issue instead of first deciding the constitutional issues. *Hagans v. Lavine,* 415 U.S. 528 (1974).

The decision of this Court in *Professional Engineers* provides a nonconstitutional ground for decision in this case. Accordingly, it would be proper for this Court to remand to the three-judge court, with instructions to assign the case to a single District Judge, for consideration of the Supremacy Clause question.

CONCLUSION

For the reasons stated it is respectfully prayed that the judgment of the three-judge court upholding the portion of § 2.02 of the Texas Optometry Act that requires a minimum of two-thirds of the members of the Texas Optometry Board to be members of TOA be reversed and judgment rendered that such portion is unconstitutional under the First and Fourteenth Amendments to the United States Constitution. In the alternative, Appellants respectfully submit that this cause should be remanded to the three-judge court or to a single district judge for further proceedings in view of the enforcement proceedings the Board currently seeks to institute against

Dr. Rogers and in view of this Court's *Professional Engineers* decision and the Supremacy Clause issues.

Respectfully submitted,

By:_____

ROBERT Q. KEITH
BRIAN R. DAVIS
VICTOR J. ROGERS, II
ARTHUR R. ALMQUIST
Counsel of Record

Of Counsel:

MEHAFFY, WEBER, KEITH & GONSOULIN
1400 San Jacinto Building
Beaumont, Texas 77701

DELEON & DAVIS
408 First Federal Plaza
Austin, Texas 78701

VICTOR J. ROGERS, II
3434 One Allen Center
Houston, Texas 77002

CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing Brief for Appellants in No. 77-1164 have been mailed, postage prepaid, this _____ day of June, 1978 to the following:

Larry Niemann
1210 American Bank Tower
Austin, Texas 78701

John Tucker
P. O. Box 1751
Beaumont, Texas 77704

Dorothy Prengler
Attorney General of Texas
P. O. Box 12548
Austin, Texas 78711

_____

APPENDIX "A"

STATE OF TEXAS)
)
COUNTY OF TRAVIS)

This is to certify that I, Lois Ewald, an Executive Secretary of the Texas Optometry Board and in such capacity have the custody and control of the Board's records, and I hereby certify that the attached is a copy of a carbon copy file record of correspondence dated May 15, 1978, addressed to the Honorable John Hill, Attorney General of Texas.

/s/ LOIS EWALD
Lois Ewald

Date: May 31, 1978

(SEAL)

May 15, 1978

Honorable John Hill
Attorney General of Texas
Supreme Court Building
P. O. Box 12548
Capitol Station
Austin, Texas 78711

Attn: David Kendall

Dear Sir:

The Texas Optometry Board is of the opinion that Section 5.11 of the Texas Optometry Act is valid and intact. Therefore, the Board requests that you enforce said section as it applies to the Texas State Optical office at 7125 Southwest Freeway in Houston, Texas; the means and timing of the enforcement is, of course, left to your discretion.

We understand that the facts of the matter are not in dispute, i.e., the Texas State Optical is a one-door office with a window display.

We are enclosing a copy of the investigative material and correspondence in regard to the matter.

Very truly yours,

E. Richard Friedman, O.D.
Chairman of the Board

ERF/le
Encl.
cc: All Board Members

(SEAL)